

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

The Crabhouse,

Appellant,

v.

Case Number: C0212260

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the decision of the Retailer Operations Division to deny the application of The Crabhouse to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). As a result, the Appellant may not reapply for six months from the effective date of the denial decision.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it denied the application of the Appellant to participate as an authorized SNAP retailer.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 ... may ... file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

The Appellant applied to participate in the SNAP as an authorized retailer in an application received on March 1, 2018. In a letter dated August 21, 2018, the Retailer Operations Division informed the Appellant that the firm was a SNAP ineligible restaurant because more than 50 percent of its total gross retail sales are from heated foods and/or prepared foods. Therefore, the firm’s application was denied. The letter also informed the Appellant that it could not submit a

new application to participate in SNAP for a period of six months from the effective date of the denial as provided by SNAP regulations at 7 CFR § 278.1(k)(2).

In a letter postmarked August 30, 2018, the Appellant requested an administrative review of the Retailer Operation Division's denial of its SNAP application. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) provides the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it fails to meet established eligibility criteria.

7 CFR § 278.1(k) reads, in relevant part:

FNS shall deny the application of any firm if it determines that: (1) The firm does not qualify for participation in the program as specified in paragraph (b), (c), (d), (e), (f), (g), (h) or (i) of this section

7 CFR § 278.1(b)(1)(iv) states, in part:

Ineligible firms. Firms that do not meet the eligibility requirements in this section or that do not effectuate the purpose of SNAP shall not be eligible for program participation ... firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer **before or after purchase**; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. This includes firms that primarily sell prepared foods that are consumed on the premises or sold for carryout [Emphasis added.]

7 CFR § 271.2, states, in part:

Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer **before or after purchase**; and **hot and/or cold prepared** foods not intended for home preparation and consumption, including prepared foods that are consumed on

the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter. Establishments that include separate businesses that operate under one roof and share the following commonalities: Ownership, sale of similar foods, and shared inventory, are considered to be a single firm when determining eligibility to participate in SNAP as retail food stores. [Emphasis added.]

7 CFR § 278.1(k)(2) reads, in relevant part:

... Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a minimum period of six months from the effective date of the denial.

Regulatory Change

Foods heated after sale were at one time considered to be SNAP eligible. However, due to a recent change in Federal regulations, foods heated after sale are now considered to be SNAP ineligible in the same manner as foods sold hot at the point of sale. On December 15, 2016, FNS published a final rule entitled “Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program (SNAP)” at 81 Federal Register 90675. This final rule added the language to existing regulations clarifying that foods heated or cooked after sale would be considered in determining whether a firm is a SNAP ineligible restaurant. This portion of the rule was implemented by FNS on October 16, 2017.

APPELLANT’S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The determination that the firm is a restaurant because over 50 percent of its revenue is from heated/prepared foods is false. The Appellant cannot determine how such a decision was made and thinks it might have been due to an error in calculation on the part of the Retailer Operations Division.
- The firm has provided the heated foods sold by day and by total and it consistently averages 14 to 17 percent.
- The firm does not have any tables for dining and does not have plates or silverware and it is a walk-in seafood store.
- The store closes at 6:00 pm and the store visit contractor visited at 5:30 pm on a Saturday when the seafood was being removed from display. The firm is also closed on Sundays. A restaurant would not close at 6:00 pm on a Saturday and remain closed on a Sunday.
- The Appellant has provided signatures and telephone numbers from its customers who can offer their opinion whether the firm is a restaurant.

The preceding may represent only a brief summary of the Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The central issue in this case is whether The Crabhouse is a SNAP ineligible restaurant under 7 CFR § 278.1(b)(1)(iv). In reaching its decision to deny the firm's application, the Retailer Operations Division relied upon the firm's application, the store visit report, and documents provided by the Appellant. A review of the entire case record indicates by a preponderance of the evidence that the Retailer Operations Division properly determined that The Crabhouse does not qualify for the SNAP as it is primarily a takeout seafood restaurant.

Application

The Appellant's application received on March 1, 2018 estimated the firm's staple food sales at 75 percent of its annual gross retail sales. The firm also reported that an estimated 25 percent of its annual gross sales are in hot, heated, or cold prepared food not intended for home preparation and consumption. If these estimates were accurate the Appellant would be eligible under Criterion A. However, the Retailer Operations Division questioned these figures and noted that the firm was licensed as a restaurant and marketed on social media as a restaurant.

Store Visit Report

The case record documents that in reaching a denial decision, the Retailer Operations Division also considered information obtained during a May 19, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. Through the store visit report and photographs, the Retailer Operations Division determined that the firm likely has the majority of its gross retail sales in hot, heated and cold prepared food not intended for home preparation and consumption. The store photos document that The Crabhouse presents itself primarily as a seafood take out restaurant with a display menu of prepared foods. Although the firm likely has some fresh seafood and other staple food sales, The Crabhouse has a large kitchen and food preparation area along with chairs for customers to sit on while food is being prepared. Outside signage states that the firm serves wings, crabs and shrimp.

SNAP regulations at 7 CFR § 278.1(b)(1)(iv) states, in part "firms that have more than 50 percent of their total gross sales in foods **cooked or heated on-site** by the retailer **before or after purchase**; and **hot and/or cold prepared foods** not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, **shall not qualify** for participation as retail food stores. [Emphasis added.]

Social Marketing

Social media markets The Crabhouse as a takeout seafood restaurant. The firm provided a description of the business to both Yelp and Yahoo stating: “We are a brand new seafood **restaurant** opening mid-December. We specialize in blue crab, shrimp, and chicken wings!” [Emphasis added.] The firm provided a description on Google which states: “The Crab House is a locally owned and operated establishment. We are a brand new **seafood restaurant** opening on November 1st. We specialize in blue crab, crawfish, shrimp, and chicken wings! Call us today!” [Emphasis added.] Customer reviews on social media included statements such as “they make everything to order” and “customers do not pick the crabs.” These statements provided further support that the firm largely sells prepared foods.

Appellant’s Evidence

The Appellant provided some spreadsheets breaking out heated/prepared foods, staple food and non-food sales from May 25, 2018 through June 30, 2018. However, these spreadsheets appear to be merely summations without the underlying supporting documents which would enable the Retailer Operations Division to verify that this information is an accurate representation of the Appellant firm’s sales. Therefore, this evidence was insufficient to overturn the decision of the Retailer Operations Division based on the other evidence in the case indicating that the firm is primarily a take-out food restaurant.

The Appellant provided signatures and phone numbers of alleged customers and claimed that these individuals would provide their opinion that The Crabhouse is not a restaurant. However, this list of customers does not provide any probative value to the case. The determination of whether or not a firm is an ineligible SNAP restaurant is not based on community opinions, but is instead based on how a restaurant is defined under SNAP regulations at 7 CFR § 278.1(b)(1)(iv).

Basis of Determination

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time of the store visit which forms the basis of the Retailer Operations Division’s action. The Appellant may reapply six (6) months from the effective date of the denial and any new business model or sales figures will be taken into consideration at that time.

CONCLUSION

Based on the analysis above, the decision by the Retailer Operations Division to deny the SNAP application of The Crabhouse is sustained. The regulations clearly state the criteria that a store

must meet in order to be authorized for the SNAP. There are no exceptions to these requirements. In accordance with 7 CFR § 278.1(k)(2), the Appellant shall not be eligible to submit a new application for SNAP authorization until six months after August 21, 2018, the effective date of the denial decision.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute and unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

October 29, 2018